

DEC 26 1991

(2)
No. 91-835

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

RICHARD CALDER, Petitioner

v.

RETA JOB, Respondent

PETITION FOR WRIT OF CERTIORARI to the
SUPREME COURT OF THE STATE OF UTAH

BRIEF IN OPPOSITION TO PETITION FOR
CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did 28 U.S.C.A. § 1334(b), which grants federal district courts "original but not exclusive jurisdiction of all civil proceedings arising under Title 11 or arising in or related to cases under Title 11," divest the state trial court of subject matter jurisdiction over Reta and Dennis Job's ("Jobs") state law tort claims against Petitioner Richard Calder ("Calder")?

2. Is the existence of concurrent subject matter jurisdiction under 28 U.S.C.A. § 1334(b) dependent upon a federal court's decision to abstain under 28 U.S.C.A. § 1334(c)?

3. Was the adjudication of the Jobs' legal malpractice and related state law tort disputes in state court an exercise of jurisdiction over property of Calder's bankruptcy estate under 28 U.S.C.A. § 1334(d)?

PARTIES TO THE PROCEEDING

In addition to petitioner Richard Calder and respondent Reta Job, Dennis Job was initially a party to the proceeding. Dennis Job, who was Reta Job's husband, was a co-plaintiff with Reta Job. Dennis Job died in February 1989. The probate estate of Dennis Job did not appear in the proceeding before the Utah Supreme Court. Reta Job is the personal representative of the probate estate of Dennis Job.

TABLE OF CONTENTS

Citation To Opinions Below.....	1
Relevant Statutes.....	1
Statement Of The Case.....	1
Summary Of Argument.....	8
Argument.....	10
I. The Issues Raised By Calder's Petition Do Not Warrant Review By The Court.....	10
II. The Jobs' Malpractice Claim Was A Related Proceeding Under 28 U.S.C.A. § 1334(b) Over Which The State Court Had Concurrent Subject Matter Jurisdiction.....	13
III. The Malpractice Litigation Against Calder Was Not A "Core" Claims Allowance Proceeding.....	18
IV. The Jobs' Action Against Calder Involved Post-petition Claims....	22
V. The Jobs Did Not Consent To The Bankruptcy Court Resolving The Underlying Dispute.....	24
VI. The Trial Court Did Not Exercise Jurisdiction Over Property Of Calder's Bankruptcy Estate.....	25
Conclusion.....	26
Appendix A - Findings of Fact and Conclusions of Law	
Appendix B - 28 U.S.C.A. § 1334	

TABLE OF AUTHORITIESStatutes

11 U.S.C.A. § 362 (1979 & Supp. 1981).....	12n, 15, 16
11 U.S.C.A. § 502 (1979 & Supp. 1981).....	21, 23
11 U.S.C.A. § 1305(a)(1979).....	23
28 U.S.C.A. § 157 (Supp. 1991).....	18, 19
28 U.S.C.A. § 1334 (Supp. 1991).....	1, 15, 19
28 U.S.C.A. § 1334(a) (Supp. 1991).....	14n, 20, 21
28 U.S.C.A. § 1334(b) (Supp. 1991)8, 10, 11, 13, 14n, 15, 16, 17, 20, 26	
28 U.S.C.A. § 1334(c) (Supp. 1991).....	9
28 U.S.C.A. § 1334(d) (Supp. 1991).....	9, 25

Cases

<u>Bill Walker & Associates, Inc. v. Parrish,</u> 770 S.W.2d 764 (Tenn. App. 1989).....	15
<u>Brock v. Morysville Body Works, Inc.,</u> 829 F.2d 383 (3rd Cir. 1987).....	15
<u>Delgado Oil Co., Inc. v. Torres,</u> 785 F.2d 857 (10th Cir. 1986).....	25
<u>DiAntonio v. Pennsylvania State University,</u> 455 F. Supp. 510 (M.D. Pa. 1978).....	16

<u>Fitzgerald v. Critchfield</u> , 744 P.2d 301 (Utah Ct. App. 1987).....	15
<u>In re Aaronics Equipment Rentals & Sales, Inc.</u> , 56 B.R. 297 (Bankr. M.D. La. 1985).....	19
<u>In re Bellucci</u> , 119 B.R. 763 (Bankr. E.D. Cal. 1990).....	14, 20
<u>In re Calder</u> , 907 F.2d 953 (10th Cir. 1990).....	4n, 6n, 12, 16n, 21
<u>In re Clowser</u> , 39 B.R. 883 (Bankr. E.D. Va. 1984).....	16
<u>In re Comstock Financial Services, Inc.</u> , 111 B.R. 849 (Bankr. C.D. Cal. 1990).....	20
<u>In re Gardner</u> , 913 F.2d 1515 (10th Cir. 1990).....	13
<u>In re Majestic Energy Corp.</u> , 835 F.2d 87 (5th Cir. 1988).....	19
<u>Kalb v. Feuerstein</u> , 308 U.S. 433 (1940).....	26
<u>Pacor, Inc. v. Higgins</u> , 743 F.2d 984 (3rd Cir. 1984).....	13
<u>Parker v. McLain</u> , 237 U.S. 469 (1915)...	10
<u>Plaquemines Tropical Fruit Co. v. Henderson</u> , 170 U.S. 511 (1898).....	17
<u>State v. Johnson</u> , 100 Utah 316, 114 P.2d 1034 (1941).....	17
<u>Rules</u>	
Sup. Ct. R. 10.1.....	10

CITATION TO OPINIONS BELOW

There were no written opinions, published or unpublished, in the case below. The relevant orders of the Utah Supreme Court and the Third District Court of Salt Lake County, State of Utah, are attached to Calder's Petition as Appendices A and B, respectively.

RELEVANT STATUTES

28 U.S.C.A. § 1334 (Supp. 1991) is reproduced in Appendix B.

STATEMENT OF THE CASE

1. In October 1983, Dennis and Reta Job ("Jobs") filed a Chapter 7 bankruptcy in the United States Bankruptcy Court for the District of Utah. Calder, who was, prior to his disbarment by the Utah Supreme Court, a licensed attorney practicing in the area of bankruptcy law, represented the Jobs as debtors' counsel.

See Findings of Fact and Conclusions of Law dated February 24, 1986, attached

hereto as Appendix "A" ("App. A") 1-2,
Findings ("F.") ¶¶ 1 & 6.

2. The bankruptcy schedules signed by the Jobs disclosed a then-pending lawsuit in which they were plaintiffs ("Pocklington Lawsuit"). However, the schedules Calder's office filed with the bankruptcy court did not list the Pocklington Lawsuit. App. A 3, F. ¶¶ 5 & 7.

3. On February 23, 1984, Calder filed a Chapter 13 bankruptcy case on behalf of himself in the United States Bankruptcy Court for the District of Utah, a case which was open until dismissed by the court in August 1986. Petition for Writ of Certiorari ("Petition") at 4.

4. In April 1984, the defendants in the Pocklington Lawsuit discovered that the Jobs' bankruptcy schedules did not disclose that lawsuit. The Pocklington

defendants, inferring fraud and perjury by the Jobs, moved to reopen the Jobs' Chapter 7 bankruptcy and requested a continuance of the scheduled trial in the Pocklington Lawsuit. App. A 4, F. ¶¶ 9-11.

5. Calder told the Jobs he would remedy the problem of the incorrect schedules on file with the bankruptcy court. Instead of moving to amend the Jobs' bankruptcy statement of affairs and schedules, however, Calder filed a separate Chapter 13 case for the Jobs on April 27, 1984. App. A 5-6, F. ¶¶ 12-15.

6. Calder failed to inform the bankruptcy court or trustee that the omission of the Pocklington Lawsuit was his error, or to oppose the motion to reopen the case. App. A 6, F. ¶ 17.

7. On August 8, 1984, the bankruptcy court revoked the Jobs' bankruptcy

discharge in their Chapter 7 and dismissed the Jobs' Chapter 13 case as improperly filed. Calder withdrew as counsel over the objection of the Jobs two days prior to the August 8th hearing. In September 1984, the Jobs lost their home to foreclosure. App. A 9-10, F. ¶¶ 26-32.

8. In the fall of 1984, the Jobs filed suit against Calder in the Third Judicial District Court for Salt Lake County (the trial court below) alleging state law causes of action for legal malpractice, libel and intentional infliction of emotional distress. Calder's Petition at 5-6. The automatic stay did not apply to the Jobs' lawsuit against Calder.^{1/}

^{1/} The Tenth Circuit Court of Appeals has ruled that the Jobs' lawsuit against Calder fell within an equitable exception to the automatic stay. In re Calder, 907 F.2d 953, 956 (10th Cir. 1990). The Jobs did not obtain relief from the automatic stay

9. In 1985, Calder filed a motion to reopen one of the Jobs' bankruptcies, falsely alleging tax evasion and bankruptcy fraud. App. A. 11-12 & 15, F. ¶¶ 35-36, Conclusion ("C.") ¶ 9.

10. In January 1986, the state trial court found Calder liable to the Jobs. The court entered judgment against Calder on February 24, 1986. See App. C to Calder's Petition. The court largely

Footnote continued from previous page.

because they did not know Calder was in bankruptcy. Calder's Petition at 6, Statement of Case ¶ 10. Calder raised the automatic stay issue in 1988 in an objection to the Jobs' proof of claim in a separate Chapter 7 bankruptcy Calder filed in August 1986. The Tenth Circuit held that Calder's inequitable conduct of litigating while failing to notify the Jobs or the Third District Court of Calder's 1984 Chapter 13 bankruptcy precludes Calder from invoking the automatic stay from his Chapter 13 with respect to the Jobs' claims or judgment. Id. at 956. Calder did not seek review of the Tenth Circuit's decision.

based the award of damages on Calder's failure to inform the bankruptcy court and trustee that the Jobs were not at fault for the erroneous schedules, filing a separate Chapter 13 for the Jobs instead amending the Chapter 7 schedules, withdrawing as counsel two days prior to a crucial hearing, and falsely accusing the Jobs' of tax and bankruptcy fraud, all of which occurred subsequent to February 23, 1984, the date Calder filed his Chapter 13 petition. See App. A 4-17, F. ¶¶ 10-40 & C. ¶¶ 6-14.

11. Calder first notified the state court and the Jobs of his pending Chapter 13 bankruptcy on February 5, 1986.^{2/}

^{2/} Calder's statement that he delayed notifying the Jobs or the state court of his bankruptcy because he believed the claims were post-petition (Calder's Petition at 7) contradicts Calder's previous explanation. In his unsuccessful challenge to the

12. The Jobs filed a proof of claim in Calder's Chapter 13 bankruptcy in May 1986, three months after entry of the judgment. See App. G to Calder's Petition.

13. Calder first challenged the subject matter jurisdiction of the state trial court by motion filed in January 1991. Calder appealed the trial court's denial of his motion to the Utah Supreme Court, filing a motion for summary disposition of the appeal. Job filed a cross-motion for summary dismissal. The Utah Supreme Court granted Job's motion to summarily dismiss the appeal "on the basis that the grounds for review are so insubstantial as to not merit further

Footnote continued from previous page.

validity of the Jobs' judgment based upon the automatic stay, "Calder's only explanation" for the delay was "that he forgot." In re Calder, 907 F.2d 953, 956 (10th Cir. 1990).

proceedings and consideration by this court." Order of Utah Supreme Court dated June 13, 1991, attached to Calder's Petition as App. "A."

SUMMARY OF ARGUMENT

The simple and straightforward issues presented by Calder's petition do not present substantial federal questions that warrant review by this Court. The plain language of the applicable bankruptcy jurisdictional statute supports the decision of the state district court which was affirmed by the Utah Supreme Court on the ground Calder's appeal did not merit its consideration. 28 U.S.C.A. § 1334(b) (Supp. 1991) ("Section 1334(b)") expressly makes federal jurisdiction over claims "related to" a bankruptcy "not exclusive." The non-exclusivity of federal jurisdiction under Section 1334(b) is not

dependent on a federal court deciding to abstain under Section 1334(c).

The state court resolved a state law dispute. It did not allow a claim for purposes of Calder's bankruptcy. Further, the judgment was based primarily upon tortious post-petition conduct of Calder.

The Jobs' filing of a proof of claim after entry of the state court judgment did not retroactively submit the state law dispute to the exclusive jurisdiction of the bankruptcy court. Finally, the Jobs' state law tort claims were not in rem proceedings in which the state court exercised jurisdiction over any property of Calder's bankruptcy estate under Section 1334(d). No prior decision of this Court or a United States court of appeals conflicts with the decision of the Utah Supreme Court to refuse to consider

Calder's appeal on the grounds it was totally without merit.

ARGUMENT

I. THE ISSUES RAISED BY CALDER'S PETITION DO NOT WARRANT REVIEW BY THE COURT.

There are no "special and important reasons" to grant Calder's petition for certiorari. See Sup. Ct. R. 10.1. The Utah Supreme Court decision Calder asks this Court to review is not a written opinion, but a one sentence order by the clerk dismissing Calder's appeal as "so insubstantial as to not merit further proceedings and consideration by this court." Where the federal question raised in a petition for review is based upon a mistaken assumption or is clearly without merit, there is no basis for this Court to review the state court decision. See Parker v. McLain, 237 U.S. 469 (1915). The language of 28 U.S.C.A. § 1334(b)

expresses a clear congressional intent that federal courts do not have exclusive jurisdiction over matters "related to" bankruptcy cases. Calder's petition mistakenly assumes that the "original" language of Section 1334(b) divests other courts of concurrent jurisdiction of matters related to a bankruptcy. Calder also mistakenly assumes that the Jobs' claim against him involved property of his bankruptcy estate. Given the mistaken assumptions of Calder, the Utah Supreme Court's summary dismissal, apparently based upon the clear statutory language of Section 1334, does not present a federal question warranting review by this Court.

Further, the unusual backdrop of this case regarding the automatic stay would limit the precedential value of any decision by this Court. In essentially all bankruptcy cases, the automatic stay would

prevent the exercise of concurrent jurisdiction by a state court over related state law claims unless the plaintiffs had sought and obtained relief from stay from the bankruptcy court. In the instant case, the automatic stay did not apply to invalidate the Jobs' state court judgment because of Calder's inequitable conduct of failing to notify the Jobs and the state court of his bankruptcy after the state court had found Calder liable at trial.

In re Calder, 907 F.2d 953, 956 (10th Cir. 1990).^{3/} A decision of this Court would therefore be precedent only in extremely limited circumstances.

3/ Calder's petition states that the Jobs did not seek relief from the automatic stay to try their action in state court, improperly implying a violation of Section 362. Calder's Petition at 61. Calder ignores the Tenth Circuit's ruling that the automatic stay did not apply.

II. THE JOBS' MALPRACTICE CLAIM WAS A RELATED PROCEEDING UNDER 28 U.S.C.A. § 1334(b) OVER WHICH THE STATE COURT HAD CONCURRENT SUBJECT MATTER JURISDICTION.

The statute governing bankruptcy jurisdiction expressly makes federal court jurisdiction over matters related to bankruptcy cases non-exclusive. 28 U.S.C.A. § 1334(b) (Supp. 1991) ("Section 1334(b)") provides:

[T]he district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11. (emphasis added)

The Jobs' state law tort dispute was "related to" Calder's bankruptcy because the "outcome . . . could conceivably have an effect on the estate being administered in bankruptcy." Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3rd Cir. 1984) (interpreting former codification of Section 1334(b)); In re Gardner, 913 F.2d 1515,

1518 (10th Cir. 1990). Calder acknowledges this point in his Petition at 37-48.

By making federal jurisdiction over disputes "related to" bankruptcy cases "not exclusive", Congress made it clear that state courts retain concurrent subject matter jurisdiction over proceedings such as the Jobs' state law legal malpractice and related tort disputes against Calder.^{4/} As stated in In re Bellucci, 119 B.R. 763 (Bankr. E.D. Cal. 1990):

"Jurisdiction over an underlying state law

^{4/} The express language of Section 1334(b) that federal district court jurisdiction over "related" proceedings is not exclusive and directly contrasts with the language in Sub-section (a) governing jurisdiction over actual bankruptcy cases:

(a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.

28 U.S.C. § 1334(a) (Supp. 1991) (emphasis added).

dispute is concurrent in the state and federal courts." Id. at 777. See also Brock v. Morysville Body Works, Inc., 829 F.2d 383, 385-386 (3rd Cir. 1987) (Section 1334(b) grants district court overseeing bankruptcy concurrent jurisdiction over related claims, does not divest jurisdiction from other courts); Bill Walker & Associates, Inc. v. Parrish, 770 S.W.2d 764, 768 (Tenn. App. 1989); state court has jurisdiction under Section 1334(b) to adjudicate related state law dispute); Fitzgerald v. Critchfield, 744 P.2d 301, 304 n.1 (Utah Ct. App. 1987) (Section 1334 "did not withdraw from the state courts subject matter jurisdiction over any suit involving a bankruptcy debtor").

The automatic stay of 11 U.S.C.A. § 362 typically stays any state court exercise of concurrent subject matter jurisdiction over related state law disputes.

Section 362 does not, however, "deprive the state court jurisdiction over the matter." In re Clowser, 39 B.R. 883, 884 (Bankr. E.D. Va. 1984). The state court below was free to exercise its concurrent jurisdiction because the automatic stay did not apply to the Jobs' action.^{5/}

Calder attempts to avoid application of the plain language of Section 1334(b) by focusing on the grant of "original jurisdiction" and ignoring Congress' statement that such jurisdiction is "not exclusive." "Original jurisdiction in federal court does not mean exclusive jurisdiction" DiAntonio v. Pennsylvania State University, 455 F. Supp. 510, 512 (M.D. Pa. 1978). Original jurisdiction means the authority to adjudicate a case or controversy in the first

^{5/} See In re Calder, supra, 907 F.2d at 956.

instance, as opposed to appellate jurisdiction. State v. Johnson, 100 Utah 316, 114 P.2d 1034, 1037 (1941). State courts retain concurrent jurisdiction when a federal statute provides federal courts with original jurisdiction, but does not expressly make the grant of jurisdiction exclusive. See Plaquemines Tropical Fruit Co. v. Henderson, 170 U.S. 511, 517-519 (1898).

Calder argues that the original federal jurisdiction under Section 1334(b) must be "divested" by a federal court abstaining before a state court has subject matter jurisdiction. Petition at 17. Nothing in Section 1334(b) suggests that a state court is stripped of concurrent jurisdiction unless and until a federal court decides to abstain. Abstention is a decision of a federal court not to exercise jurisdiction it possesses over a

particular dispute because another court has jurisdiction. Abstention does not create jurisdiction in another court, but follows from it under appropriate circumstances.

In the instant case, the federal courts had "original but not exclusive jurisdiction" over the state law legal malpractice and related tort disputes by reason of Calder's bankruptcy. The state trial court retained concurrent subject matter jurisdiction over the state law tort claims against Calder.

III. THE MALPRACTICE LITIGATION AGAINST CALDER WAS NOT A "CORE" CLAIMS ALLOWANCE PROCEEDING.

Calder argues extensively that adjudicating the Jobs' legal malpractice and related tort causes of action was a "core" matter under 28 U.S.C.A. § 157 (Supp. 1991) over which the bankruptcy court had exclusive jurisdiction. (See Petition at

18-37.) Calder's focus on "core" versus "non-core" confuses the jurisdictional analysis. The extent of federal jurisdiction over bankruptcy cases and related proceedings is defined by 28 U.S.C.A. § 1334. If there is federal jurisdiction under Section 1334, 28 U.S.C.A. § 157 then applies to determine whether a district court may decide the matter, or whether the matter is a "core" proceeding for which the bankruptcy court may make a final adjudication. In re Majestic Energy Corp., 835 F.2d 87, 90 (5th Cir. 1988). See also In re Aaronics Equipment Rentals & Sales, Inc., 56 B.R. 297, 298 (Bankr. M.D. La. 1985). Although Calder does not characterize it as such, the argument that the bankruptcy court had exclusive jurisdiction to adjudicate the Jobs' tort action is in essence an argument that the Jobs' state court lawsuit fell under the

exclusive jurisdiction provision of 28 U.S.C.A. § 1334(a), rather the "original but not exclusive jurisdiction" language of Section 1334(b).

Calder's argument that the bankruptcy court had exclusive jurisdiction appears to be premised on a mistaken assumption that the state court "allowed" a claim of the Jobs in Calder's bankruptcy. Entry of a judgment in a related proceeding against a debtor does not preempt the authority of a bankruptcy court to determine the allowability of a claim against the bankruptcy estate. See In re Comstock Financial Services, Inc., 111 B.R. 849, 859 (Bankr. C.D. Cal. 1990). See also In re Bellucci, 119 B.R. 763, 769-771 (Bankr. E.D. Cal. 1990) (staying objection to bankruptcy claim based on state court judgment until resolution of state court appeal). In the instant case, the state

court liquidated the amount of damages suffered by the Jobs. The state court did not allow a claim against the bankruptcy estate under 11 U.S.C.A. § 502 (1979 & Supp. 1991). That remained the exclusive province of the federal courts pursuant to 28 U.S.C.A. § 1334(a).

The distinction between adjudicating an underlying dispute and allowing a bankruptcy claim was illustrated in a subsequent bankruptcy of Calder with respect to a claim based upon the very judgment Calder is now challenging. After the bankruptcy court dismissed Calder's 1984 Chapter 13 case, Calder filed a separate Chapter 7 bankruptcy in 1986. Calder objected to the proof of claim the Jobs filed in that proceeding based upon the state court judgment. See In re Calder, supra, 907 F.2d at 955. The bankruptcy court entered an order allowing the claim

of Dennis Job, but denied Reta Job's claim against the estate because she had not signed the proof of claim.

The state trial court did not "allow" a claim against Calder's bankruptcy estate. The trial court decided a state law dispute. The bankruptcy court retained authority to allow or disallow the Jobs' claim against Calder's bankruptcy estate.

IV. THE JOBS' ACTION AGAINST CALDER INVOLVED POST-PETITION CLAIMS.

Calder's argument that the Jobs' lawsuit against him involved the allowance of a prepetition claim over which the bankruptcy court had exclusive jurisdiction also fails because the state court judgment was based primarily on post-petition conduct of Calder. The bulk of Calder's tortious conduct upon which the state court based its award of damages,

including the intentional torts, occurred after February 23, 1984, the date Calder filed his Chapter 13 petition. (Failing to amend the schedules, improperly filing a Chapter 13 for the Jobs, failing to attend hearings, withdrawing as counsel and falsely accusing the Jobs of tax and bankruptcy fraud). App. A 4-17, F. ¶¶ 10-40, C. ¶¶ 6-14.

The Jobs' claims against Calder based upon post-petition tortious conduct were not allowable against Calder's Chapter 13 estate. See 11 U.S.C.A. § 1305(a)(1979) (only tax and certain consumer debts are allowable post-petition claims under Chapter 13). Therefore, even if Calder were correct in arguing that liquidation of a state law dispute in state court "allows" a claim against a bankruptcy estate under 11 U.S.C.A. § 502, Calder's argument that the state court

lacked subject matter jurisdiction would fail. Post-petition tortious conduct is not a basis for a claim against a Chapter 13 bankruptcy estate.

V. THE JOBS DID NOT CONSENT TO THE BANKRUPTCY COURT RESOLVING THE UNDERLYING DISPUTE.

Calder's argument that the Jobs consented to bankruptcy court jurisdiction to determine the dispute by filing a proof of claim ignores the timing of the proof of claim. The Jobs did not file a proof of claim in Calder's Chapter 13 proceeding until May 1986, months after the state court trial in January 1986 and the entry of judgment in February 1986. See App. C & G to Calder's Petition. Filing the proof of claim therefore could not have affected the jurisdiction of the state court to resolve the dispute at an earlier point in time.

VI. THE TRIAL COURT DID NOT EXERCISE JURISDICTION OVER PROPERTY OF CALDER'S BANKRUPTCY ESTATE.

The argument that adjudicating the Jobs' legal malpractice and related tort action was an exercise of jurisdiction over property of Calder's bankruptcy estate prohibited by 28 U.S.C.A. § 1334(d) (Supp. 1991) is patently without merit. The state court did not exercise in rem jurisdiction over property of any kind.

Delgado Oil Co., Inc. v. Torres, 785 F.2d 857 (10th Cir. 1986), cited by Calder in support of his argument, is not applicable to the instant case. In Delgado Oil, the Tenth Circuit Court of Appeals held that a preference cause of action against a director of a corporate debtor was property of the bankruptcy estate. The court found that the cause of action belonged to the bankruptcy estate because the action could only be asserted by the

corporation. Id. at 861-862. The legal malpractice and related causes of action in the instant case were property of the Jobs, not of Calder or his bankruptcy estate.

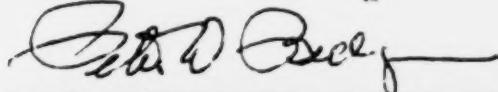
The numerous other decisions of courts of appeals involving in rem proceedings cited by Calder are inapplicable. There was no property of Calder's bankruptcy estate over which the state trial court asserted jurisdiction. This Court's decision of Kalb v. Feuerstein, 308 U.S. 433 (1940), is also inapposite because it too involved in rem jurisdiction, a foreclosure of property of the debtors or the bankruptcy estate.

CONCLUSION

The state court had subject matter jurisdiction over the Jobs' legal malpractice and related state law tort claims under the plain language of 28 U.S.C.A. §

1334(b). The decision of the Utah Supreme Court summarily dismissing for lack of merit Calder's appeal from the decision of the state trial court is in accord with the statute and relevant case law. The trial court had concurrent subject matter jurisdiction over the Jobs' state law legal malpractice and related tort claims. There are no special and important reasons warranting a writ of certiorari. The Court should deny Calder's petition.

DATED this 19 day of December
1991.



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APPENDIX "A"

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H. Dixon Hindley, Clerk
3rd Dist. Court

By /s/
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD
JUDICIAL DISTRICT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

DENNIS R. JOB and)
RETA JOB,)
Plaintiffs,) FINDINGS OF FACT
vs.) AND
RICHARD CALDER,) CONCLUSIONS OF LAW
Defendant.) Civil No. C-84-5436
) JUDGE FREDERICK

THIS MATTER having come before the
Court on the 9th day of January, 1986, the
Honorable Judge Frederick presiding, and
having reviewed the file, the memoranda
and exhibits, having heard the testimony

of parties, the witnesses and the evidence presented at trial, and the Court being otherwise fully advised, now enters the following:

FINDINGS OF FACT

1. In approximately October, 1983, Plaintiffs retained Defendant, an attorney licensed to practice law in the State of Utah, as their counsel to advise them regarding the filing of a Chapter 7 bankruptcy proceeding.
2. Defendant is a specialist in bankruptcy law, having testified he has filed some 6,000 bankruptcies.
3. Plaintiffs informed Defendant that Dennis Job owned stock and was a Plaintiff in a Federal District Court lawsuit, Job v. Pocklington, et al., C82-1085C, which involved, inter

alia, a contract dispute over Plaintiff Dennis Job's former employment.

4. Defendant made a note of said lawsuit in his working papers to be listed as an asset.
5. Plaintiffs signed schedules prepared by Defendant that included said lawsuit as an asset.
6. Plaintiffs' Chapter 7 bankruptcy was filed on October 13, 1983, No. 83C-02769.
7. Defendant and/or his employee personally filed the schedules with the Bankruptcy Court, but said schedules did not list the Federal District Court lawsuit or ownership of stock as assets.
8. The Bankruptcy Court entered an Order of Discharge on January 9, 1984, noting "the above matter has been closed as a 'no asset' case."

9. The Defendants in the Federal District Court lawsuit learned, after deposing Dennis Job, that Plaintiffs had filed the Chapter 7 bankruptcy, and upon checking the court files, that the lawsuit and ownership of stock were not listed as assets.
10. On or about the 13th day of April, 1984, said Defendants moved to reopen the Chapter 7 bankruptcy, inferentially alleging bankruptcy fraud and perjury for failure to list the assets.
11. Said Defendants also moved to continue the trial date in the Federal District Court which had been set for May 21-23, 1984, on grounds similar to those alleged in their Motion to Reopen, and that the lawsuit, upon reopening the Chapter 7, would be in the control of the Chapter 7 trustee.

12. Plaintiffs finally contacted Defendant, told him they were very upset over his failure to list the assets and the allegations of fraud and perjury brought against them, and asked him to oppose the Motion to Reopen, to which Defendant responded he would take care of it.
13. Defendant failed to take appropriate corrective action when it became known the omission occurred.
14. Defendant determined, rather than seeking to amend the Chapter 7 schedules, to file a Chapter 13 proceeding, for which Plaintiffs paid him an additional \$150, and which was filed April 27, 1984, No. 84A-01143.
15. Defendant's expert witness, Judith Boulden, the standing trustee for Chapter 13 bankruptcies, testified

this procedure was an improper use of the bankruptcy law.

16. Defendant omitted Plaintiffs' stock ownership as an asset in the Chapter 13 plan.
17. Defendant failed to oppose the motion to reopen or express to the Bankruptcy Court or Judith Boulden that the assets were revealed to him by the Plaintiffs or that the omission was his mistake.
18. Defendant admitted he did not think it was his duty to the Plaintiffs to acknowledge his mistake.
19. Defendant alleged in his Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment that Plaintiffs had stolen a key to his office and tampered with the schedules, or substituted schedules in the Bankruptcy Court's file.

20. On May 3, 1984, at a hearing in front of Judge Christensen, the Motion to Continue the Federal District Court lawsuit was provisionally granted with another hearing set for June 12, 1984, after the Bankruptcy Court decided on the Motion to Reopen the Chapter 7. Judge Christensen indicated he wished Defendant to attend the June 12 hearing.
21. On May 15, 1984, Defendant stated during the hearing on the Motion to Reopen: "Well, we don't oppose reopening the case", and the Motion was granted.
22. On June 12, 1984, the Motion to Continue the Federal District Court lawsuit was granted without a new date set, and Plaintiffs' attorney in said lawsuit, Dennis Olsen, moved to withdraw on the grounds, inter alia, that

the lawsuit was not in control of the Chapter 7 trustee, which motion was granted.

23. Plaintiffs expended \$3,600 in costs and fees in preparing their Federal District Court lawsuit for trial.
24. Defendant failed to attend the June 12 hearing.
25. Plaintiffs and Defendant had a meeting during which Plaintiffs expressed their loss of faith in the representation of Defendant, that they feared being subjected to bankruptcy fraud and perjury again for failure to list stock ownership in the Chapter 13 plan, and the effect Standing Order #19 had regarding dismissal. As a result of these discussions, Plaintiffs did not attend the creditors meeting for their Chapter 13 bankruptcy.

26. On June 26, 1984, the standing Trustee for the Chapter 13 bankruptcy moved to dismiss Plaintiffs' Chapter 13 with prejudice, or in the alternative, to reconvert to a Chapter 7.
27. Defendant told Plaintiffs he would handle the Trustee's Motion.
28. On July 3, 1984, Defendant moved to withdraw as Counsel for Plaintiffs. Defendant did not state in his motion that Plaintiffs owed him any money, and Defendant has not sent Plaintiffs a bill.
29. On August 6, 1984, over Plaintiffs' objection, the Motion to Withdraw was granted, just two (2) days prior to the hearing on the Trustee's motion.
30. On August 8, 1984, a hearing was held on the Trustee's motion, and the court ordered the discharge previously granted under the Chapter 7

would be revoked, and the Chapter 13 would be dismissed without prejudice.

31. Plaintiffs were unable to afford new bankruptcy counsel; and on September 18, 1984, they filed a Chapter 11 bankruptcy pro se, in an attempt to prevent foreclosure proceedings which had commenced on their home.
32. Plaintiffs were 33 minutes late in filing the Chapter 11, a motion was brought to terminate the automatic stay, which motion was granted, and they lost their home in which they had lived for 24 years and had equity in the amount of \$12,574.
33. Due to the emotional distress caused by the foul up in their bankruptcies, the allegations of fraud and perjury brought against them, the delay of and new defenses in their Federal District Court lawsuit, and the loss

of their home, Plaintiffs' daughter was obligated to move in with her sister, and subsequently Plaintiffs were separated for over three (3) months.

34. On or about December 7, 1984, Plaintiffs settled their Federal District Court lawsuit for \$15,000 and an assignment of rights, if any, that the Defendants in said lawsuit may have had in \$40,000 deposited with the Bankruptcy Court, pursuant to a plan of reorganization of the Great Northern Baseball Corporation.
35. On July 16, 1985, just six (6) days after Plaintiffs moved for summary judgment in this matter, Defendant moved to reopen Plaintiffs' Chapter 11 bankruptcy.
36. Defendant alleged, inter alia, in his Motion to Reopen, that he was a

creditor of Plaintiffs and that Plaintiffs had committed bankruptcy fraud and income tax evasion for failure to report \$30,000 worth of income.

37. Defendant mailed his Motion to Reopen to all creditors of Plaintiffs and to the Internal Revenue Service.
38. Defendant's Motion to Reopen was summarily denied by the Bankruptcy Court.
39. During Defendant's direct examination, it became apparent he had misinterpreted "the year before" on line 2.D. of Plaintiffs' Statement of Affairs concerning income, as the year 1982, not 1981 to which it referred.
40. The Federal District Court lawsuit was worth \$100,000, but the value was diminished by 60% by reason of the

fact that Plaintiffs' attorney, John McDonald, was told by the attorney for the Defendants in said lawsuit that they were preparing a defense to attack the credibility of Dennis Job based upon his alleged failure to list the lawsuit in the Chapter 7 bankruptcy.

CONCLUSIONS OF LAW

1. Defendant's conduct represented legal malpractice in several particulars which caused the Plaintiffs direct damage.
2. Defendant's conduct was intentional, malicious, without cause or basis in fact, and in reckless [sic] disregard of the Plaintiffs' rights.
3. Defendant's conduct represented an egregious violation of his legal and

ethical obligations to the
Plaintiffs.

4. An attorney employed to prepare a written instrument is liable for any losses sustained by his client as a result of the negligent preparation of such writing.
5. Defendant was negligent in omitting assets in the schedules filed with the bankruptcy court.
6. Defendant was negligent in failing to take appropriate corrective action when it became known the omissions of assets occurred.
7. Defendant was negligent in failing to express to the Bankruptcy Court or to the standing trustee that the omission was his mistake.
8. Defendant's conduct in withdrawing as counsel was intentional and in

wreckless [sic] disregard of the rights of Plaintiffs.

9. Defendant's conduct in filing a motion to reopen Plaintiffs' Chapter 11 bankruptcy was intentional, malicious, and in wreckless [sic] disregard of the rights of Plaintiffs; Defendant's allegations were without any authority or basis in fact; and it was no coincidence that Defendant filed said motion just six (6) days after Plaintiffs filed their motion for partial summary judgment.
10. Plaintiffs were damaged and Defendant is liable for diminution in value of the lawsuit calculated as follows:
\$100,000 less \$55,000 received for a net of \$45,000, diminution of which 60% was attributable to the conduct of Defendant, which sum equals \$27,000 minus \$9,000 that would have

been paid from the recovery, leaving a net of \$18,000.

11. Plaintiffs were damaged and Defendant is liable for \$240 fees and costs for the Chapter 7 proceeding, \$150 fees and costs for the Chapter 13 proceeding, and \$3,600 fees and costs for preparing the Federal District Court lawsuit for trial.
12. Plaintiffs were damaged and Defendant is liable for \$12,574 representing Plaintiffs' equity in their former home.
13. Plaintiffs were damaged and Defendant is liable for \$10,000 general damages for emotional distress and suffering inflicted by thereckless [sic] and/or intentional conduct of the Defendant.
14. Defendant is liable for \$10,000 punitive damages for his malicious and

intentional conduct, and is liable
for a total award of damages in the
amount of \$54,564.

DATED this 24th day of February,
1986.

/s/ Peter H. Waldo
PETER H. WALDO, Attorney
for Plaintiffs

BY THE COURT:

/s/ J. Dennis Frederick
JUDGE FREDERICK

Approved as to form:

DANIEL BOONE, Attorney for
Defendants

ATTEST
H. DIXON
HINDLEY,
Clerk
By /s/
Deputy Clerk

DJP:121091B



APPENDIX "B"



28 U.S.C. § 1334.

BANKRUPTCY CASES AND PROCEEDINGS

- (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
- (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.
- (c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.
(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain or not to abstain made under this subsection

is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

- (d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

